TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~699~~ 67

NASHVILLE MILK COMPANY, PETITIONER,

vs.

CARNATION COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 19, 1957

CERTIORARI GRANTED MARCH 4, 1957

UPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 699

NASHVILLE MILK COMPANY, PETITIONER,

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[fol. 1] IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX TO APPELLANT'S BRIEF

IN THE UNITED STATES DISTRICT COURT,
For the Northern District of Illinois,
Western Division.

Civil Action. Equitable Relief Sought.

No. 55-C-21.

NASHVILLE MILK COMPANY, a corporation, Plaintiff,

v.

CARNATION COMPANY, a corporation, Defendant.

PREFIX TO RECORD

1. Time of commencement of action: October 19, 1955.

2. Names of parties: Plaintiff-Appellant, Nashville Milk Company, a Corporation. Defendant-Appellee, Carnation Company, a Corporation.

3. Dates of filing of pleadings: Complaint, October 19, 1955. Motion to dismiss complaint, November 8, 1955.

4. Time of trial and name of judge: The case was heard and determined upon the motion to dismiss. Briefs were submitted by the respective parties and the determination by the court was upon the briefs. Hence, there was not a particular day of trial. Honorable J. Sam Perry was the District Judge.

5. Nature of judgment: The judgment sustained the motion to dismiss and dismissed the complaint.

6. Date of judgment: May 29, 1956.

7. Date of filing notice of appeal: June 22, 1956.

[fol. 3] IN THE UNITED STATES DISTRICT COURT

COMPLAINT—Filed October 19, 1955

Now comes the plaintiff, Nashville Milk Company, a corporation, and, complaining of the defendant, Carnation Company, a corporation, alleges as follows:

1. The plaintiff (sometimes hereinafter referred to as Nashville) is a corporation organized under the laws of the state of Illinois. The defendant, Carnation Company, a corporation, (sometimes hereinafter referred to as Carnation) is a corporation organized under the laws of the State of Delaware. Carnation owns and operates a factory for processing milk products, hereinafter more particularly referred to, at Morrison, Illinois, in Whiteside County, and transacts business in said county, which is within the Western Division of the United States District Court for the Northern District of Illinois. This action is brought under the provisions of Section 13-A Title 15 United States Code (Act of June 19, 1936, C. 592, Section 3, 49 Stat. 1528); Section 15 Title 15 United States Code (Act of October 15, 1914, C. 323, Section 4, 38 Stat. 731); And Section 26 Title 15 United States Code (Act of October 15, 1914, C. 323, 38 Stat. 737). Jurisdiction of this action is vested in this court under the provisions of Section 1337 Title 28 United States Code (Act of June 25, 1946, C. 646, 62 Stat. 931). All of the foregoing provisions will be hereinafter referred to according to the respective sections and titles of the United States Code.

2. Since May 1950, Nashville has manufactured evaporated milk at its factory located at Nashville, Illinois, and has sold the product in various parts of the United States, as a consequence of which it has become experienced in the manufacturing and marketing of various milk products.

[fol. 4] 3. Filled milk is a milk product customarily sold in sealed cans. The method of processing of filled milk is well known to people experienced in the manufacturing of milk products. It consists of removing butter fat from whole milk. To the milk from which butter fat has been removed, there is then added vegetable oils, such as cocoa-

nut oil or cottonseed oil, and vitamins. The product is then evaporated, that is the excess water content is removed, following which it is sterilized, cooled, and placed in sealed cans. The product so placed in sealed cans is not deleterious to the health of a person consuming it, but is a wholesome food fit for human consumption; And the filled milk manufactured and sold by Nashville, hereinafter referred to, has likewise been a wholesome food fit for human consumption and not deleterious to the health of a person consuming it; And it has been lawful under the laws of the State of Illinois to manufacture and sell filled milk during the period it has been manufactured and sold by Nashville hereinafter referred to.

4. Nashville has manufactured and sold filled milk in Illinois since April 1951. In furtherance of its purpose of manufacturing and selling filled milk Nashville had previous to April 1951, in August 1950, determined to market its filled milk product under the trade name or trade mark of "Rich Whip" and on August 18, 1950 had registered such name with the Secretary of State of Illinois under the provisions of the laws of Illinois for the registration of trade marks. In order to develop a market for the sale of Rich Whip and to gain a valuable asset of good will, Nashville began an advertising program in the latter part of 1951 giving wide publicity to Rich Whip in various advertising channels which program has continued down to the date hereof. As the result of such advertising program, the business acumen of the officers and employees of Nashville and the wholesomeness of Rich Whip for [fol. 5] human consumption, the product has been well received on the market by customers and Nashville was able to market a great quantity of it; and it became widely known and saleable in the State of Illinois and Nashville thereby gained a valuable asset of good will which it retained until the occurrence of the unlawful acts of the defendant hereinafter referred to.

5. Carnation owns all or the controlling interest in the stock of various corporations, the latter being commonly called subsidiaries. Carnation and its subsidiaries manufacture and sell various dairy products such as evaporated

milk, powdered milk, malted milk, butter, ice cream and cheese; And they own and operate among other factories, more than 30 factories for the processing of milk, which factories are located in more than 20 states; And 8 factories for the manufacturing of tin cans which are located in more than 5 states. Carnation and its subsidiaries order and cause to be shipped in interstate commerce large amounts of unprocessed dairy products and other materials used in the processing of dairy products for the purpose of processing in factories of Carnation or its subsidiaries located in states into which shipments are made from without such states; And they ship or cause to be shipped processed dairy products for sale in states both within and without the states where they were processed by Carnation or its subsidiaries. The principal office or place of business of Carnation is in the State of California from which state the management and direction of the business of Carnation and its subsidiaries in interstate commerce occurs as well as the management and direction of the manufacturing and sale of Topic hereinafter referred to.

6. On or about the month of May, 1952, Carnation began to manufacture filled milk at its factory located at Morrison, Illinois and has continued to do so until the date hereof. Previous to that time Carnation had manufactured no [fol. 6] filled milk in the State of Illinois; or if it had previously manufactured filled milk it had done so only in isolated instances or in small quantities not sufficient to give Carnation a reputation as a manufacturer of filled milk in this state. For the purpose of manufacturing filled milk and making it saleable, Carnation has brought or caused to be brought into Illinois whole milk, tin cans and carton or containers from Wisconsin and has brought or caused to be brought vegetable oils from points outside of Illinois into Illinois. Labels used on the cans containing the filled milk manufactured by Carnation have been brought, or caused to be brought, into Illinois from Ohio by Carnation. The aforesaid items so moved in interstate commerce to Carnation have been necessarily used by Carnation in its production and sale of filled milk, hereinafter referred to.

7. On or about the month of May 1952 Carnation in competition with Nashville in the sale of Rich Whip began the sale of filled milk in Illinois manufactured at its factory at Morrison as aforesaid and such sales of filled milk, so in competition with Nashville, have continued until the date hereof. The filled milk so sold by Carnation has been marketed under the trade name or trade mark of "Topic" in cans bearing the label "Topic" which labels Carnation has brought or caused to be brought into Illinois from Ohio as aforesaid. Such filled milk so marketed in Illinois, and the filled milk hereinafter referred to markefed by Carnation in Missouri, will be sometimes hereinafter referred to as "Topic".

8. Cans, whole milk, and cartons which Carnation brings or causes to be brought into Illinois from Wisconsin to its factory at Morrison comprise a common stock upon which Carnation draws for the manufacturing and shipping of Topic and evaporated milk respectively, the latter being shipped from Illinois to points outside the state as afore-[fol. 7] said. Employees of the defendant at its factory at Morrison who are employed in the manufacturing and preparation for shipment of Topic are also employed in the manufacturing and preparation for shipment of evaporated milk, such employees not being limited in their activities to but one of the aforesaid products.

9. On or about the month of February 1953, Carnation began to manufacture filled milk in a factory operated by it in the State of Missouri in which state filled milk may be lawfully manufactured and sold; And it has manufactured and sold filled milk in that state from that time to the date hereof. Previous to the aforesaid date Carnation had not manufactured or sold filled milk to the merchandising trade in that state; or if so, such manufacturing and selling had only occurred in isolated instances or in connection with the production and sale of small quantities not sufficient to give Carnation a reputation as a manufacturer or seller of filled milk in that state. The filled milk so sold by Carnation in Missouri has been marketed under the trade mark or trade name "Topic". The cans containing such filled milk bear the same or substantially

similar type labels as those sold by Carnation in Illinois. And the product sold by Carnation under the trade name or trade mark "Topie" in Missouri is the same or substantially the same as the product sold by Carnation under the same trade name in Illinois.

10. Carnation maintains two offices to promote and supervise the sale of Topic in Illinois, one located at Chicago, Illinois, and the other at St. Louis, Missouri, each having had territories in Illinois assigned to it under directions or orders given by Carnation from California to employees of Carnation at its offices at Chicago, Illinois and St. Louis, Missouri, respectively. The principal office of Carnation is in the State of California where major determinations and decisions having been made dealing with the [fol. 8] manufacturing and sale of Topic from the date Carnation began the sale of Topic in Illinois to the date hereof. Such determinations and decisions have been transmitted from time to time during the aforesaid period from employees or officers of Carnation in California to its employees at Chicago, Illinois and at Morrison, Illinois, and to employees at its offices at St. Louis, Missouri, and have included among other things, directions for the purchase of supplies used in the manufacturing of Topic, the amounts or quantity of Topic to be manufactured, the nature and extent of its advertising program, prices to be charged for the sale of Topic and matters of policy of Carnation regarding its production and sale.

11. Carnation has conducted an advertising program at Chicago, Illinois and St. Louis, Missouri by newspaper and radio advertising which has promoted the sale of Topic in both states. This program began in the aforesaid cities respectively shortly after Carnation began to sell Topic in Illinois under the supervision of its offices in each of said cities and has continued to the date hereof. Newspapers bearing such advertising have been shipped by the publishers thereof from Illinois into Indiana and Wisconsin, and from Missouri into Illinois. Sound waves carrying such advertising program have been transmitted by radio from Illinois into Indiana and Wisconsin, and from Missouri into Illinois. Such advertising program has invited

and encouraged buyers indiscriminately without regard to their residences to purchase Topic and without regard to whether such purchases of Topic be made in Illinois or Missouri or whether it be manufactured in either state; And such advertising program has materially aided and enhanced Carnation in the sale of Topic in Illinois.

Payment by Carnation of the cost of manufacturing, advertising and selling of Topic in Illinois is made by means of checks drawn by it upon banks located in California [fol. 9] which the payees thereof deposit in banks located in Missouri and Illinois and which checks are thereafter accepted for payment at the banks located in California upon which such checks are drawn by Carnation. Checks given by customers in payment of Carnation in Illinois are deposited by it in Missouri and Illinois banks. Subsequently, Carnation draws checks upon balances in said Missouri and Illinois banks and deposits them to its account with banks located in California.

13. Salesmen employed by Carnation under its supervision and direction in Missouri, enter Illinois from Missouri and take orders for Topic from Illinois customers. Orders so obtained in Illinois are then taken by the salesmen, or transmitted by the salesmen by mail or otherwise, to the office of Carnation in Missouri. Thereafter, Carnation from its office in Missouri sends directions by mail or otherwise to its factory at Morrison, Illinois, for the filling of said orders by the delivery of Topic from the aforesaid factory to the customers. Bills or invoices are prepared by Carnation at its office in Missouri and transmitted to the aforesaid factory by mail or otherwise. These bills or invoices show the names and addresses of each customer in Illinois from whom an order has been taken which is to be filled, the amount or quantity of Topic to be shipped to the customer and its selling price; and each such bill or invoice accompanies each shipment of Topic from Carnation's aforesaid factory to each customer. The practice followed by Carnation in selling and delivering Topic as averred in this paragraph began on or about February 1953 and has continued to the date hereof.

14. At divers times since Carnation has manufactured and sold Topic in Illinois, it has distributed printed adver-

tising matter in Illinois containing offers whereby any person sending labels from cans containing Topic to Carnation or a subsidiary at Los Angeles, California, would [fol. 10] be entitled to receive from Carnation, or a subsidiary, various articles of merchandise such as stockings, jewelry and kitchenware; And numerous persons have so transmitted such labels from Illinois to Carnation or a subsidiary in California and Carnation or its subsidiary has in return transmitted such articles of merchandise from California to Illinois. At divers times since Carnation has manufactured and sold Topic in Illinois, it has distributed printed advertising matter in Illinois containing offers of discounts in the sale of Topic to persons buying Topic at retail with the further offer that a retailer who would give or allow such discount would be reimbursed for the same by mailing a coupon to Carnation at Los Angeles, California; And numerous persons have received such discounts and numerous retailers have transmitted such coupons from Illinois to Carnation in California from which state Carnation has mailed remittances to retailers in Illinois to reimburse them for such discounts. All of the offers, acts and conduct of Carnation above set forth have aided Carnation in the sale of Topic in Illinois.

15. The manufacture and sale of Topic in Illinois by Carnation, has been an integrated part of the business in interstate commerce otherwise carried on by Carnation in the manufacturing and sale of other products referred to in Paragraph No. 5 hereof from the time Carnation began to manufacture and sell Topic in Illinois to the date hereof.

16. From the aforesaid date when the defendant began the sale of Topic in Illinois to the date hereof, it has violated Section 13-A Title 15 United States Code in the manner following:

> It has sold or has contracted to sell Topic in Illinois at unreasonably low prices for the purpose of destroying the competition of Nashville in its sale of Rich Whip and eliminating Nashville as a competitor in the selling of Rich Whip. Such conduct of Carnation has [fol. 11] occurred in the course of commerce within the meaning of the term "in the course of commerce" as

used in Section 13-A Title 15 United States Code through the means and methods heretofore averred by which Carnation manufactures, advertises, sells, directs the sale of and finances the sale of Topic in Illinois and by reason of the fact that such selling and manufacturing of Topic is an integrated part of the business in interstate commerce otherwise carried on by Carnation.

17. Such unlawful conduct of Carnation has been carried on by it in market areas served by Nashville in the sale of Rich Whip and with customers of Nashville and in areas where or with buyers to whom Nashville could reasonably be expected to have sold Rich Whip had it not been for such unlawful conduct of Carnation. As a direct and proximate result of such unlawful conduct, Nashville has been unable to successfully compete with Carnation in the sale of Rich Whip in Illinois and has lost numerous customers to Carnation who are attracted by unreasonably low prices charged for Topic by Carnation; and Nashville has been unable to expand its market in Illinois and gain new customers it could have reasonably expected to have without such unlawful conduct.

18. As a direct and proximate result of the aforesaid unlawful conduct of Carnation from the beginning thereof to the present time, the business of Nashville has suffered loss and damage consisting of the following: Loss of profits due to loss of customers and loss of Nashville's asset of good will in excess of $350,000. Nashville's total damages being treble damages as provided by Section 15 Title 15 United States Code, are in excess of $1,050,000.

19. The aforesaid unlawful acts of Carnation in restraint of interstate commerce are continuing ones and under Section 26 Title 15 United States Code Nashville is [fol. 12] entitled to the issuance of an injunction enjoining the continuance thereof.

20. Nashville, in order to enforce its rights against Carnation, has employed the services of attorneys and under the provisions of Section 15 Title 15 United States Code,

it is entitled to reasonable attorneys' fees for the services rendered by the attorneys in this proceeding.

Wherefore, the plaintiff prays that judgment be entered against the defendant in the amount of One Million and Fifty Thousand Dollars ($1,050,000) and that in addition there be allowed by the court to the plaintiff reasonable attorneys' fees and costs as provided by law.

The plaintiff further prays that the defendant be perpetually enjoined from its unlawful conspiracy and from continuing in the commission of its other unlawful acts above set forth.

Nashville Milk Company

By: Sherwood Dixon, George K. Ray, Edward M. Sullivan, Jerome F. Dixon, Karl Edwin Seyfarth, Its Attorneys.

Sherwood Dixon, Esquire, and George K. Ray, Esquire, of Dixon, Devine and Ray, 121 E. First Street, Dixon, Illinois.

Jerome F. Dixon, Esquire, 231 South LaSalle Street, Chicago 4, Illinois.

Edward M. Sullivan, Esquire, Amboy, Illinois.

Karl Edwin Seyfarth, Esquire, 208 South LaSalle Street, Chicago, Illinois.

[fol. 13] In the United States District Court

Motion of Defendant to Dismiss the Complaint—Filed November 8, 1955

Now comes the defendant in the above entitled cause, by its attorneys, and moves the Court to dismiss said cause for failure to state a claim upon which relief can be granted in that

1. The Robinson-Patman Act does not protect a business engaged in making and selling a product banned by Congress from the channels of interstate commerce;

2. The complaint fails to allege that any sales of filled milk by the plaintiff, the defendant, or either of them was in the course of interstate commerce, or that the defendant

contracted to sell filled milk in the course of interstate commerce;

3. The complaint fails to allege that the manufacture of filled milk by the defendant was in the course of interstate commerce;

4. Private action may not be maintained for a supposed violation of Section 3 of the Robinson-Patman Act (15 U. S. C. § 13a).

Ferris E. Hurd, Melville C. Williams, Attorneys for Defendant.

Ferris E. Hurd, Melville C. Williams, 120 S. LaSalle Street, Chicago 3, Illinois, Tel: RAndolph 6-6680.
Of Counsel: Pope & Ballard, 120 S. LaSalle Street, Chicago 3, Illinois, Tel: RAndolph 6-6680.

November 14, 1955.

[fol. 14] UNITED STATES DISTRICT COURT

ORDER DISMISSING COMPLAINT—May 29, 1956

This case came on to be heard upon the motion of the defendant to dismiss the complaint. This Court has carefully examined and considered the pleadings and the briefs of counsel. Contention of the defendant that relief should not be accorded the plaintiff under the provisions of the Robinson-Patman Act in view of the declared Congressional policy relative to filled milk as announced in 21 U. S. C. A. 62 which proscribes the shipment or delivery for shipment of filled milk in interstate commerce, has been considered and is sustained.

Contentions of defendant that the complaint fails to state a cause of action and that a private action may not be maintained for supposed violation of Section 3 of the Robinson-Patman Act (50 U. S. C. A. 13a) have been considered and are overruled.

It is, therefore, Ordered that the complaint be and it is hereby dismissed.

Enter:

J. S. Perry, Judge.

Dated: May 29, 1956.

[fol. 15] IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois,
Western Division.

NOTICE OF APPEAL—Filed June 22, 1956

Notice is hereby given that Nashville Milk Company, a corporation, plaintiff-appellant above named hereby appeals to the United States Court of Appeals for the Seventh Circuit from the order or judgment entered in this cause on May 29, 1956, which dismissed the complaint.

Sherwood Dixon and George K. Ray, Edward M. Sullivan, Karl Edwin Seyfarth, Jerome F. Dixon, Attorneys for Plaintiff-Appellant.

Sherwood Dixon, and George K. Ray, Dixon, Devine and Ray, 121 East First Street, Dixon, Illinois.

Jerome F. Dixon, 231 South LaSalle St., Chicago, Illinois.

Karl Edwin Seyfarth, 208 South LaSalle St., Chicago, Illinois.

Edward M. Sullivan, Amboy, Illinois.

[fol. 16] The names and addresses of the attorneys of record for plaintiff-appellant are as follows:

Sherwood Dixon, and George K. Ray, Dixon, Devine and Ray, 121 East First Street, Dixon, Illinois.

Jerome F. Dixon, 231 South LaSalle Street, Chicago, Illinois.

Karl Edwin Seyfarth, 208 South LaSalle Street, Chicago, Illinois.

Edward M. Sullivan, Amboy, Illinois.

The names and addresses of the attorneys of record for the defendant-appellee are as follows:

Melville C. Williams, 120 South LaSalle Street, Chicago, Illinois.

Pope and Ballard, 120 South LaSalle Street, Chicago, Illinois.

[fol. 17] CLERK'S CERTIFICATE OF MAILING (omitted in printing).

[fol. 18] Clerk's Certificate to foregoing Transcript omitted in printing.

[fol. 19] IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 11820. September Term and Session, 1956

NASHVILLE MILK COMPANY, Plaintiff-Appellant,

v.

CARNATION COMPANY, Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, WESTERN DIVISION

OPINION—November 1, 1956.

Before DUFFY, *Chief Judge*, and MAJOR and SCHNACKENBERG, *Circuit Judges*.

DUFFY, *Chief Judge*. This is an appeal from an order dismissing the complaint herein before trial. This action was brought under § 3 of the Robinson-Patman Act (§ 13a, Title 15 U.S. Code). Plaintiff sought to recover treble damages and asked injunctive relief claiming defendant had sold filled milk at unreasonably low prices for the purpose of destroying competition by plaintiff in its sale of a like product.

Plaintiff is an Illinois corporation, and since April, 1951, has manufactured and sold filled milk within the State of Illinois where such manufacture and sale is legal under the laws of Illinois. Defendant is a Delaware corporation which owns and operates some 30 factories in 20 states for the processing of milk.

[fol. 20] Since May, 1952, defendant has manufactured filled milk at its factory located at Morrison, Illinois. For the purpose of manufacturing filled milk defendant has transported or caused to be transported into Illinois whole milk from the State of Wisconsin, and vegetable oils from various points outside of Illinois. The filled milk manufactured by Carnation has been marketed under the name "Topic" while plaintiff's filled milk product was marketed under the name "Rich Whip".

Defendant moved to dismiss the complaint on four grounds. 1) The Robinson-Patman Act does not protect a business engaged in making and selling a product banned by Congress from the channels of interstate commerce; 2) The complaint fails to allege that any sales of filled milk by either plaintiff or defendant were in the course of interstate commerce; 3) The complaint fails to allege that the manufacture of filled milk by the defendant was in the course of interstate commerce, and 4) A private action may not be maintained for an alleged violation of § 3 of the Robinson-Patman Act.

The District Court dismissed the complaint for the reason that no relief should be accorded to the plaintiff in view of the declared congressional policy relative to filled milk as announced in 21 U.S.C.A. § 62 which proscribes the shipment or delivery for shipment of filled milk in interstate commerce.

The decision of the District Court must be affirmed if the order of dismissal can be sustained on any of the grounds urged by defendant in support of its motion to dismiss. *Gallagher & Speck, Inc.* v. *Ford Motor Company*, 7. Cir., 226 F. 2d 728, 731. Inasmuch as we are convinced that a private action may not be maintained for a violation of § 3 of the Robinson-Patman Act, we shall not discuss the other grounds urged by the defendant.

The Supreme Court has not ruled upon this question[1] and as far as we are advised, there has been no direct decision on the point by any Court of Appeals. There is, however, a direct conflict of authority in the District Courts. The leading case which holds that such a cause of action does exist is *Balien Ice Cream Co. Inc.* v. *Arden Farms Co., et al.*, 94 F. Supp. 796 (DC Calif. 1950). The leading case [fol. 21] to the contrary is *Vance* v. *Safeway Stores*, 137 F. Supp. 841 (DC N. Mex., 1956). In the *Vance* case Judge Rogers carefully considered the decision in the *Balien Ice*

[1] Section 3 has been referred to in Supreme Court dicta as though it were a statute under which a private suit for treble damages could be maintained. Bruce's Juices, Inc. v. American Can Co., 330 U. S. 743, 750, and Moore v. Mead's Fine Bread Co., 348 U. S. 115, 117. However, in neither of these cases was the private right to sue under Section 3 in issue.

Cream case and reached the conclusion that it was wrongly decided.

Plaintiff has no right to sue for treble damages or injunctive relief unless a federal statute has created that right. *Sun Theatre Corp.* v. *RKO Radio Pictures, Inc.*, 7 Cir., 213 F. 2d 284, 286; *Paine Lumber Company, Ltd. et al.* v. *Neal etc. et al.*, 244 U.S. 459, 471. The only statutes upon which the plaintiff could possibly rely are sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15, 26); Section 4 provides that any person injured in his business or property by reason of anything forbidden by the "antitrust laws" may recover treble damages. Section 16 authorizes private suits for injunctive relief against threatened damage by a violation of the "antitrust laws."

The Clayton Act (38 Stats. 730) defines the term "antitrust laws" and states precisely what that term means as it is used throughout the Act. Section 1 of the Clayton Act defines "antitrust laws" to mean the Sherman Act (Act of July 2, 1890), the Wilson Tariff Act (Act of August 27, 1894), the Act amending the Wilson Tariff Act (Act of February 12, 1913) and the Clayton Act itself.

It is quite apparent that confusion has arisen as to whether section 3 of the Robinson-Patman Act is an "antitrust law" within section 1 of the Clayton Act because of an error in codification in the 1940 U.S. Code. In the 1926 U.S. Code, section 4 of the Clayton Act was codified (15 U.S.C. § 12) to read: "'Antitrust laws' as used in sections 12-27 of this title (Title 15) includes sections 1-27 of this title." This was correct because sections 1-27 of Title 15 were the Sherman Act, the Wilson Tariff Act (as amended) and the Clayton Act. The 1934 Code was the same.

However, in the 1940 Code which followed the passage of the Robinson-Patman Act in 1936, the codifiers only partially recognized that sections 2, 3 and 4 of the Robinson-Patman Act (codified as 15 U.S.C. § 21a, § 13a and § 13b) were no part of the Clayton Act or any amendments to any of its sections by changing the figures "12-27" in 15 U.S.C. 12 (the codification of section 1 of the Clayton Act) to 12, 13, 14-21, 22-27," so that the statute read: "'Antitrust laws' as used in Secs. 12, 13, 14-21 and 22-27 of this title includes secs. 1-27 of this title." But the codi-

[fol. 22] fiers failed to make a corresponding change in the figures 1-27 with the result upon casual inspection the term "antitrust laws" might seem to include secs. 2, 3 and 4 of the Robinson-Patman Act. The 1946 and 1952 Codes continued the error.

However, the United States Code is only prima facie evidence of the laws of the United States. In case of inconsistencies between the code and the corresponding legislation theretofore enacted, effect is to be given to the enactments themselves. 1 U.S.C. p. 4; *Stephan* v. *United States*, 319 U.S. 423, 426.

Because section 1 of the Robinson-Patman Act is without question an amendment of the Clayton Act, it has been argued that section 3 is also such an amendment. A close examination of the text of the Robinson-Patman Act and of its legislative history convinces us that section 3 is not an amendment of the Clayton Act.

The first section of the Robinson-Patman Act begins with this statement: "Be it enacted * * * that Sec. 2 of (the Clayton Act) is amended to read as follows:". No such statement appears at the beginning of sections 2, 3 or 4 of the Robinson-Patman Act. These sections do not purport to amend as section 1 specifically did.

Immediately following the enacting clause, section 1 continues with the text of subsections (a) through (f) each subject being enclosed in quotation marks so as to show how the amended section 2 of the Clayton Act is to read. There are no quotation marks enclosing any of the remaining sections. This omission of quotation marks is significant to one who is accustomed with the procedures used in drafting bills and amendments thereto in the Congress of the United States. Illustrations of the practice of enclosing in quotation marks that portion of the bill which amended other laws can be seen in such legislation as Chapter 634, 49 Stat. 1555 relating to the Migratory Bird Act; Chapter 811, 49 Stat. 1925, relating to Naturalization Laws and Chapter 816, 49 Stat. 1930, relating to Welfare of American Seamen, in each of which quotation marks enclose the portions of those bills which amended existing law while quotation marks were omitted for those portions of the bills which were not amendments.

The legislative history is convincing that there was no intention by Congress for section 3 of the Robinson-Patman Act to be an amendment of the Clayton Act. Senator Robinson and Representative Patman had introduced their bills in the Senate and House, respectively. About eight [fol. 23] months later a bill known as the Borah-Van Nuys Bill was introduced into the Senate. This provided for a criminal statute. Later, the Borah-Van Nuys Bill was attached to the Robinson Bill in the senate by a floor amendment. The phraseology of the Borah-Van Nuys measure remained unchanged until its enactment as section 3 of the Robinson-Patman Act.

After the passage of the Patman bill in the House and the Robinson bill in the Senate, these bills went to a conference. The Conference Committee reported a revised draft on June 15, 1936 which incorporated the Borah-Van Nuys measure as section 3 (80 Cong. Rec. 9414). The report of the Conference Committee (80 Cong. Rec. 9414, 9902) expressly stated that only section 1 was an amendment of the Clayton Act. The report stated:

"Section 2.

"The provisions of Section 2 of the House bill were agreed to without amendment by the Senate. Relating only to pending rights of action and proceedings, and being therefore temporary in purpose, it appears in the conference report as section 2 of the bill itself, rather than as part of *the amendment to section 2 of the Clayton Act, which is provided for in section 1 of the present Bill.*" (Emphasis supplied)

"Section 3.

"Subsection (h) of the Senate amendment, which was not contained in the House bill, was accepted by the House conferees, and * * * appears in the conference report as section 3 of the bill itself. It contains the operative and penal provisions of what was originally the Borah-Van Nuys Bill (S. 4171). *While they overlap in some respects*, they are in no way inconsistent with the *provisions of the Clayton Act amendment provided for in section 1.*" (Emphasis supplied)

Representative Utterback, Chairman of the House Members of the Joint Conference Committee, stated in his report to the House (80 Cong. Rec. 9419): "Section 3 of the bill sets aside certain practices therein described and attaches to their commission the criminal penalties of fine and imprisonment therein provided. It does not affect the scope or operation of the prohibitions or limitations laid down by *the Clayton Act amendment provided for in section 1.*" (Emphasis supplied).

[fol. 24] Representative Miller, one of the House conferees of the Joint Conference Committee, stated (80 Cong. Rec. 9421): "Section 3 is the Borah-Van Nuys amendment. We accepted that amendment for this reason and this reason only. The first section of the bill as reported back here *amends section 2 of the Clayton Act.*" Mr. Miller, when asked whether section 3 was "a part of the same act" as the part of the bill amending the Clayton Act replied (80 Cong. Rec. 9421): "Of course it is, *but it is not a part of the Clayton Act* * * *." (Emphasis supplied).

Writers of law articles on the subject here for decision have taken the position that no action may be maintained for treble damages under section 3 of the Robinson-Patman Act. 50 *Harvard Law Review*, 106, 121-122; 85 *University of Pennsylvania Law Review*, 306, 312; 22 *Washington Law Quarterly*, 153, 159, 182; 22 *American Bar Association Journal*, 593, 649.

The Attorney General's National Committee to Study the Antitrust Laws said, on page 201 of its report of March 31, 1955:

> "We believe that acceptance of section 3 as a basis for private treble damage litigation involves highly dubious statutory construction and, more important, finds support neither in the legislative intent nor overall antitrust policy. Hence, at the least, any authority to enforce Section 3 should be restricted to responsible officials of the United States. Such drastic legislation threatening common and competitive pricing practices with the risk of criminality, if tolerated at all should be accessible only to the government which has already sought to limit its application."

As we have reached the conclusion that a private action may not be maintained for a violation of Section 3 of the Robinson-Patman Act, it follows that the District Court was correct in dismissing the complaint and the order and judgment of dismissal must be and is

AFFIRMED.

[fol. 25] UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

No. 11820

NASHVILLE MILK COMPANY, Plaintiff-Appellant,

v.

CARNATION COMPANY, Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, *Eastern* DIVISION

JUDGMENT—November 1, 1956

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Western Division, and was argued by counsel.

On consideration whereof; it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, with costs.

[fol. 26] Clerk's certificate to foregoing record omitted in printing.

[fol. 27] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 4, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.